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Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-2063

W. L. McIlroy and James Dunlavey,
as Executor of the Estate of
Grady R. McIlroy ..... *Petitioners*

vs.

State of Arkansas Ozark Society and
Wayfarer Expeditions, Inc. ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

Petitioners, W. L. McIlroy and James Dunlavey, as Executors of the Estate of Grady R. McIlroy, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on March 17, 1980.

Opinions Below

The opinion of the Arkansas Supreme Court, reported at 268 Ark. 227, —— SW2d —— (March 17, 1980), appears in the Appendix hereto. The Decree of the Chancery Judge of Franklin County, Arkansas, will not be reported and is also included in the Appendix.

Jurisdiction

The judgment of the Supreme Court of Arkansas was entered on March 17, 1980. A petition for rehearing was denied on April 21, 1980, and a mandate was entered on that date. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Whether the Supreme Court of Arkansas erred in holding the Mulberry Creek a navigable water course of the State of Arkansas, with title to the streambed vested in the State of Arkansas.

2. Whether the Arkansas Supreme Court can, by adopting a new standard for determining navigability, divest reparian owners of title to the bed of a stream clearly nonnavigable under prior law, and vest ownership of the streambed in the State of Arkansas without paying just compensation contrary to the Fourteenth Amendment to the United States Constitution and Article 2, Sections 22 and 23, of the Arkansas Constitution.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State de-

prive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Constitution, Article 2, Section 22:

The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

Arkansas Constitution, Article 2, Section 23:

The State's ancient right of eminent domain and of taxation is herein fully and expressly conceded; and the General Assembly may delegate the taxing power, with the necessary restriction, to the State's subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well-being, but no further.

Arkansas Natural and Scenic Rivers System Act, Act 257, Section 11, 1979, Ark. Stat. Ann. §9-1211 (Supp. 1979):

Protection of private land — Nothing in this Act shall be construed to give the public any greater right or privilege of access to private lands.

Arkansas Natural and Scenic Rivers System Act, Act 257, Section 12, 1979, Ark. Stat. Ann. §9-1212 (Supp. 1979):

The Arkansas Natural and Scenic Rivers Commission shall not have the power of eminent domain.

Statement of the Case

The Petitioners own real property containing a segment of the Mulberry River, known until very recent years as Mulberry Creek. The stream flows through Franklin County, Arkansas, a distance of approximately 55 miles to a point where it empties into the Arkansas River some 35 miles from Fort Smith, Arkansas. A portion of the Mulberry flows through the Ozark National Forest which is located north of Petitioners' property.

The Mulberry consists of long flat pools connected by shallows or rapids. It has an average width of approximately 100 feet and, except at flood stage, there is not a place in the stream with a depth of greater than six feet. There are dry spots in the stream six to eight months out of the year. During rainy seasons, the stream is canoeable and follows a dangerous and torturous course across Petitioners' property. Since 1973, four canoeists have been killed.

Until the meteoric rise in the popularity of canoeing in this area beginning in 1973, the Mulberry was undisturbed by large segments of the populace. However, canoeists became so prevalent on the stream that the riparian owners found it difficult to adequately protect livestock, barns and other private property along the river's edge from isolated incidents of vandalism by unknown third parties. Further, the canoes often capsize, and the canoeists litter and trespass on private property.

This action was initiated under the Arkansas Declaratory Judgments Act, Ark. Stat. Ann. §34-2501 *et seq.* (Repl. 1962), and was initially filed against the Ozark Society and Wayfarer Expeditions, Inc., two groups which had been

particularly active in promoting the Mulberry for the purposes of canoeing and other outdoor recreational activities. The Respondent Wayfarer had been engaged in renting canoes to third parties and in planning float trips over that portion of the stream which traversed Petitioners' property. Petitioners filed their Petition for Declaratory Judgment on June 15, 1978, in Franklin County Chancery Court, praying that the Court declare the Mulberry to be a nonnavigable stream at the point where it intersects Petitioners' property and that the Respondents be restrained from canoeing over the stream at those points without petitioners' consent. The State of Arkansas intervened as a party in the action in order to assert the right of the public to use the waters of the stream. The State had previously taken the position, through its Department of Parks and Tourism and its Game and Fish Commission, that the Mulberry was open to the public for purposes of floating by canoes, by publishing a pamphlet distributed by those agencies entitled "The Float Streams of Arkansas." The Ozark Society had likewise promoted the stream as being open to the public in its pamphlet which was at issue below, "The Mighty Mulberry." It is against this background of commercialization and invasion of the property by the State of Arkansas and by the private Respondents that the Petition for Declaratory Judgment was framed.

The Chancery Judge below held that the Mulberry is a nonnavigable stream and therefore the riparian owners own to the thread of the stream as well as the water in it and have a right to proscribe the water's use for recreational purposes by any other persons. This holding was consistent with a long line of cases decided by the Supreme

Court of Arkansas since statehood that riparian owners of nonnavigable streams own to the thread of the stream. Under Arkansas law as it existed before the supreme court's decision of March 17, 1980, when a riparian owner owned the real property through which a nonnavigable stream flowed or owned both sides of the stream, he owned the entire streambed and could prohibit all float fishing, wading, floating by canoe, or other use of the stream by all other persons without consent. The Petitioners own the real property through which a portion of the stream flows and, as such, owned the streambed, under Arkansas law as it existed prior to this case.

All parties conceded in the chancery court and in the Arkansas Supreme Court that the test for navigability under Arkansas law had always been whether the stream is capable for use commercially; that is, whether the stream is capable of carrying away the commercial products of the fields and forests contiguous to the stream. If it is not, then the stream must be held to be nonnavigable which in turn governs the extent of the rights of riparian owners.

In its decision of March 17, 1980, the Supreme Court of Arkansas, for the first time, declared that recreational use was sufficient to establish navigability. The Court, per Hickman, Associate Justice, acknowledged that this constituted a change in the law as to navigable streams and relied on cases from other jurisdictions which likewise abandoned the commercial use test in favor of the recreational use test. At page 11 of its opinion, the Court stated:

> "There is no doubt that the segment of the Mulberry River that is involved in this lawsuit can be used for a substantial portion of the year for recreational pur-

poses. Consequently, we hold that it is navigable at that place with all incidental rights of that determination."

In so holding, the Arkansas Supreme Court divested the Petitioners, and other riparian owners of the Mulberry, of property rights without due process or just compensation. The supreme court cavalierly treated this direct and substantial violation of the Fourteenth Amendment to the United States Constitution as simply "an idea whose time has come." This must be remedied by this Court.

Preservation of Federal Question

The issue of taking property without due process and just compensation was clearly before the Supreme Court of the State of Arkansas. In Petitioners' brief, at pages 34 through 41, the Petitioners urged on the Court the proposition that a reversal by the Supreme Court of Arkansas would constitute a taking of property without just compensation, this in light of the fact that the State of Arkansas has the absolute right to condemn either the fee simple title to the streambed, or a public recreational easement in the streambed upon payment of just compensation, if it so desires. Obviously, the Arkansas Supreme Court rejected this argument in holding that recreational use renders the stream navigable, and that court did not address the issue of whether there was any taking of property without just compensation in violation of the Fourteenth Amendment. The issue was raised in Petitioners' brief under the Arkansas Constitution, but the provision thereof is substantially identical to the federal constitutional guarantee. The strong dissent by Honorable John A. Fogleman, Chief

Justice, chastised the majority for completely evading the constitutional question, evidencing the fact that the dissenting Chief Justice clearly understood the constitutional issue to have been squarely presented before the Court by the Petitioners.

The federal constitutional issue was also specifically raised on petition for rehearing filed by Petitioners on or about April 2, 1980, which was denied by the Arkansas Supreme Court on April 21, 1980.

Reasons for Granting the Writ

I.

The Supreme Court of Arkansas erred in finding that the Mulberry is a navigable stream.

56 Am. Jur. *Waters*, §177 (1947) states:

> It has been stated that the division of waters into navigable and nonnavigable is merely another way of classifying them as public or private, and that navigable water embrace all bodies of water which are public in their nature.

Almost identical language is found in 65 C.J.S. *Navigable Waters*, §1 (1966).

> The trem "public waters" is ordinarily synonymous in a legal sense with "navigable waters", as distinguished from "private waters", the term used to designate nonnavigable waters, and it has been stated that a division of watercourses into navigable and nonnavigable is merely a method of dividing them into public and private, which is the more natural classification.

If a stream is nonnavigable, riparian rights extend to the center of the stream. If the owner owns the property on both sides of the stream he also owns the fee in the bed of the stream, including mineral rights. If the body of water is navigable, then the ownership of the bed and with it, the use of the waters, is in the public. 2 Tiffany, *Real Property*, §§661, 663 (3rd Edition); Jones, *Arkansas Titles*, §§345, 349 (1935); *McGahhey v. McCollum, Adm.*, 207 Ark. 180, 179 SW2d 661 (1944); *Barboro v. Boyle*, 119 Ark. 377, 178 SW 378 (1915); *Lutesville Sand and Gravel Company v.*

McLaughlin, 181 Ark. 574, 26 SW2d 892 (1930); *Little Rock, Mississippi River and Texas Railway Co. v. Brooks,* 39 Ark. 403 (1882), and Note, *Real Property — Right to Float Fish Through Another's Land,* 10 Ark. L. Rev. 145 (1956).

The true test for whether a stream is navigable in Arkansas has always been whether the stream is useful commercially. In *Barboro v. Boyle, supra,* the court, quoting *Little Rock, Mississippi River and Texas Railway Co. v. Brooks, supra,* which cited *The Montello* 87 U.S. (20 Wall.) 430 (1874) and *The Daniel Ball* 77 U.S. (10 Wall.) 557 (1870), stated:

> It is not sufficient to impress navigable character, that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this was so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose in some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable, although the annual time may not be very long . . . The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats, or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round.

The above test has been later cited with approval in

Lutesville Sand and Gravel Company v. McLaughlin, supra, and *Hayes v. State,* 254 Ark. 680, 449 SW2d 372 (1973).

It is evidenced by the citations to *The Montello, supra,* and *The Daniel Ball, supra,* the Arkansas Supreme Court has consistently adhered to the standard of navigability as adopted in the United States by this Court as an extension of the rule of common law England. The question of navigability is oftentimes a federal question, as this Court has stated on many occasions. *See, e.g., State of Utah v. United States,* 403 U.S. 9 (1971); *United States of America v. Hope State Bank,* 270 U.S. 49 (1925). The latter case confirms that the power of government to take nonnavigable streams and make navigable improvements thereon is subordinate to the Fifth Amendment to the United States Constitution, which proscribes such a taking by the United States. Of course, the provision of relevance here is the Fourteenth Amendment which applies the same proscription as to the states.

The Arkansas Supreme Court has never held that float fishing, canoeing, or any other recreational activity, would give rise to a finding of navigability of a stream. The test is a commercial one. "The mere fact that the stream might at times carry single logs or canoes or the average rowboat used by fishermen is not sufficient to establish the navigability of the stream." *In Re River Queen,* 275 F. Supp. 403, 407 (W.D. Ark. 1967), *affirmed, George v. Beavark, Inc.,* 402 F.2d 977 (8th Cir. 1968). In affirming, the Eighth Circuit Court recited at 978 that the sole issue on appeal is whether "float fishing" constituted such commerce and transportation as to characterize the stream in question as navigable. At 981, the court said, "We do not think float or

any other kind of fishing suffices when it is the sole ingredient to constitute navigability of a stream."

From the above authorities, it is clear that neither float fishing nor canoeing is sufficient to bring a stream within the "navigable" label. The test of navigability of the stream at the place in issue is a question of fact. *Barboro, supra,* and *Goforth v. Wilson,* 208 Ark. 35, 184 SW 2d 815 (1945).

The Chancellor before whom this case was tried, under the correct precedential tests, found the Mulberry to be a nonnavigable stream. This finding may only be reversed under Arkansas law if the supreme court finds that it is clearly against the preponderance of the evidence. *LeCroy v. Sigman,* 209 Ark. 469, 1 SW2d 461 (1946). The Chancellor heard testimony from many witnesses for approximately two days and received briefs from all parties before deciding this case. The evidence, including photographs, showed the Mulberry Creek is a small stream which follows a torturous course across Petitioners' lands. At various times of the year there is relatively little water in it except for the larger pools and holes. Shortly after a good rain, it is canoeable with numerous shallows throughout its course. The property in question is approximately twenty-seven miles from the head of navigation at the Arkansas River. The United States Corps of Engineers classifies the point of the stream in controversy as nonnavigable in their literature. During rainy seasons, the creek may be as wide as 115 feet but has an average width of approximately 30 feet to 100 feet. Except at flood stage, there is not a place on the creek where a person six feet tall cannot walk across. No commercial or other traffic has ever used the Mulberry as a "water highway" and until recently, no boats had been

upon it other than those which might be classified as john boats. It has never accommodated motorboats. There were two unsuccessful attempts to float logs on the Mulberry near the turn of the century.

Until 1974 the Mulberry was relatively unknown except by the local residents of its banks and their friends. Due to publication of "The Mighty Mulberry" by the Respondent Ozark Society in 1974, the establishment of the canoe renting business by Wayfarers Expeditions in 1975, and the publication of over 100,000 pamphlets entitled "Float Streams of Arkansas" by the State of Arkansas (which features the Mulberry Creek), the private property of the Petitioners has been publicized and commercialized. There are so many canoeists now using the stream during the spring that Petitioners and their neighbors can no longer enjoy the peaceful and quiet enjoyment of their property as they have in past years. The Petitioner McIlroy and other owners testified that they can no longer use their property for swimming, picnicing, fishing and other family uses due to the sudden appearance of a large number of canoeists from all over the nation. Litter is a growing problem. The State uses the Petitioners' property to promote tourism but accepts no responsibility whatsoever in helping clean up the litter left by the countless number of canoeists.

As recently as 1977, the issue of navigability of the Buffalo River, in North Arkansas, was considered by the Eighth Circuit Court of Appeals. In *Buffalo River Conservation and Recreation Counsel v. National Park Service*, 558 F.2d 1342 (8th Cir. 1977), the court found that the Buffalo is nonnavigable, but upheld the creation of prescriptive easements by adverse possession to travel over the non-

navigable stream and its bed. The evidence in this case clearly reveals the vast difference between the Buffalo and the Mulberry. If the Buffalo is nonnavigable, then *a fortiori*, this much smaller, intermittent stream is nonnavigable also.[1]

Riparian rights are synonymous with private property rights. The court in *Meriwether Sand & Gravel v. State*, 181 Ark. 216, 26 SW2d 57 (1930), said at 181 Ark. 226-228:

> Riparian rights inhere in the owner of the soil and are part and parcel of the land itself, and are vested and valuable rights which no more may be destroyed or impaired than any other part of a freehold.
>
> . . . Whether the damage to the appellees was great or slight depends largely upon the point of view. In the eyes of those . . . whose value lies only in use, it may so appear; but value lies also in something more, and that is valuable, whatever it may be, in proportion as it tends to promote not only a utilitarian purpose, but also contentment and rational pleasure. Certainly, a trout stream would add considerable value to a farm the brook alone with its shining shallows and its deep quiet pools would necessarily add much to the charm of any farmstead, and considerably enhance its market value. Living water had always been deemed a valuable and desirable thing, and when that is sullied, as in this case, the injury is not slight; but substantial, and of which a court of equity will take cognizance and remedy by its injunctive power. Where the injury is a recurring one, and the damages sustained are of a

[1]The Buffalo National River was established by Pub. L. 92-237, 16 U.S.C. §460-m-9, in 1972. This River has had national prominence for nearly twenty years as a stream especially suited for canoeing.

substantial nature, equity will restrain its continuance by injunction. . . .

McGahhey v. McCollum, supra; McLaughlin v. City of Hope, 107 Ark. 443, 155 SW 910 (1913), and *Kilgo v. Cook,* 174 Ark. 432, 295 SW 355 (1927), demonstrate the previous firm position taken by the Arkansas court in the matter of riparian owners of nonnavigable streams. In *McLaughlin, supra,* p. 447, the court made clear that: "All of the authorities agree that small streams, incapable of navigation, are wholly private property; that the title of riparian owner extends to the middle of the stream." In *Kilgo, supra,* p. 436, the court stated when discussing the parties rights regarding a nonnavigable stream: "he (Appellee) has no more right to trespass on the water over appellant's land where he would be on the land not covered by water.

II.

The decision of the Supreme Court of Arkansas violates the Fourteenth Amendment proscription on taking private property without due process of law and just compensation.

Having heretofore established the law of the State of Arkansas regarding riparian rights and nonnavigable streams, it follows that the decision of the Supreme Court of Arkansas divested the Petitioners of their rights of ownership of the bed of the Mulberry River. The legislature has established the method of eminent domain and it has never been exercised as to the property involved. This taking was done solely by judicial fiat and at the whim of the Arkansas Supreme Court. In 1979, the Arkansas Legislature adopted the Arkansas Natural and Scenic River System Act. This Act specifically provided that nothing in

the Act should be construed to give any greater right or privilege of access to private property, and the Commission did not have the right of eminent domain. By judicial fiat, the Arkansas Supreme Court has done what the Arkansas Legislature refused or was unable to do.

In its brief before the Arkansas Supreme Court, Petitioners argued strongly at pages 34 through 41 that a reversal of the Chancery Judge's decision would constitute a taking of property without just compensation. As pointed out in Petitioners' statement of the case, the Fourteenth Amendment question was clearly raised by Petitioners in their petition for rehearing, but it was denied by the court.

It is clear under the decisions of the Arkansas Supreme Court that the rights of riparian ownership are vested property rights and constitute rules of property. That this line of decisions has been consistent until March 17, 1980 is very graphically demonstrated in the dissenting opinion of Chief Justice Fogleman below. As he pointed out, the commercial use test for navigability was reaffirmed in 1930 by *Lutesville Sand & Gravel, supra,* and as recently as 1973 in *Hayes v. State,* 254 Ark. 680, 496 SW2d 372 (1973). The fact that a riparian owner's property line extends to the middle of a nonnavigable stream has been settled law in this jurisdiction for decades. Potential purchasers, as well as owners, of property along the Mulberry have a right to rely upon these rules of property. The extent of the rules of property is intermeshed with the question of whether the stream is navigable. The Supreme Court of Arkansas cannot simply disregard a rule of property. *Bishop v. Williams,* 221 Ark. 617, 255 SW2d 171 (1973). If the court's holdings have become a rule of property, they may not be overruled retroactively by the court. *O'Brien v. Atlas Finance Co.,* 223

Ark. 176, 264 SW2d 839 (1954); *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 SW2d 973 (1952).

The adoption by the Arkansas Supreme Court of the "modern trend" test of navigability determined by recreational use effectively divested the Petitioners of their property rights which had been fixed by the decisions of the Arkansas Supreme Court virtually since statehood. This was done by the court with no provision for compensation, and in the absence of due process. The issue of taking without compensation was totally ignored by the court, in favor of the "modern trend" as simply an idea whose time had come. To allow this decision to stand is unthinkable, especially in view of the fact that under the Arkansas Constitution, even if a balancing test which considers the private property owner *vis-a-vis* the public were invoked, the rights of private property must prevail under the Arkansas Constitution. This, as Chief Justice Fogleman tersely pointed out, is a case of "judicial submission to public clamor [that] is not in keeping with constitutional government."

The state may not, without compensation, diminish a riparian owner's rights by statutes declaring a river navigable. *People ex rel. Western New York & P. Ry. Co. v. State Tax Commission,* 244 N.Y. 596, 155 NE 911 (1927); *State v. Brace,* 76 N.D. 314, 36 NW2d 330 (1949). Certainly if this cannot be done by legislative enactment, it cannot be done as an exercise of raw judicial power as the Arkansas Supreme Court has undertaken. *See, also, Bino v. City of Hurley,* 273 Wis. 10, 76 NW2d 571, 56 A.L.R. 2d 778 (1956); *Petraborg v. Zontelli,* 217 Minn. 536, 15 NW2d 174 (1944).

This court has had recent occasion to consider precisely the situation that is now before it. *Kaiser Aetna v. United*

States, —— U.S. ——, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979) involved the question whether Kuapa Pond on the island of Oahu, Hawaii had been rendered navigable by certain acts acquiesced in by the United States Army Corps of Engineers. This court found that under Hawaiian law such ponds as Kuapa had always been considered private property and, therefore, the holding of the United States Court of Appeals of the Ninth Circuit that the pond was subject to public access because of the navigational servitude of the United States was reversed. This court simply would not sanction a decision by a lower court which divested property rights of longstanding under state law, holding:

> that the "right to exclude," so universally held to be fundamental element of the property right, falls within this category of interest that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of Petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. [Footnote and citations omitted] . . . thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after Petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power in paying just compensation, require them to allow free access to the dredged pond. . . .

The omitted footnote quotes Justice Brandeis' dissent in *International News Serv. v. Associated Press,* 248 U.S. 215 (1918), that "an essential element of individual property is the legal right to exclude others from enjoying it." That is

precisely the right the Petitioners had prior to the decision of the Supreme Court of Arkansas that is complained of here. For prior to this decision, ownership of opposite banks of a nonnavigable stream constituted ownership of the stream, just as if it were a pond or private lake, as in *Kaiser Aetna.*

Not only had the Petitioners been denied the legal right to exclude others from enjoying the nonnavigable stream which flowed through their property, but they have been denied any voice whatsoever, except that that adheres to any citizen of the State of Arkansas. As was urged upon the Arkansas Supreme Court below in Petitioners' Petition for Rehearing, the effect of the decision of the Arkansas Supreme Court was to divest the Petitioners of title to the streambed and vest title in the State. This decision likewise vests title to all minerals and mineral rights in and under the streambed in the State. Predictably, within a few weeks after the mandate from the Arkansas Supreme Court, oil and gas lease applications were filed with the State for mineral leases to the streambed of the Mulberry pursuant to the Arkansas Supreme Court's decision. The decision not only divests the Petitioners of the right to own and lease the mineral rights under the surface, but also precludes them from being able to sell or remove gravel from the streambed. This is a common practice in Arkansas and a common benefit of riparian ownership of nonnavigable streams.

Conclusion

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the Supreme Court of the State of Arkansas. Clearly, that court has decided a federal question of sub-

stance in a way not in accord with applicable decisions of this court. Moreover, this court should reverse, upon review, and enter judgment affirming the decision of the Chancellor for Franklin County, Arkansas, that the Mulberry Creek is nonnavigable. Although the defending chief justice below would have reversed the Chancellor on the ground that a prescriptive easement had been obtained, that would be an improper result under Arkansas law. Whether a prescriptive easement obtains is a question of fact, and the Chancellor cannot be reversed, unless clearly against the preponderance of the evidence. It is apparent that the majority of the Arkansas Supreme Court felt that the case could not be decided upon prescriptive easement grounds since they totally ignored that aspect, and decided it on the basis of simply divesting the Petitioners of their property rights in violation of the constitutions of the United States and of Arkansas. It is a firmly intrenched doctrine that constitutional questions will not be reached unless the case cannot possibly be decided upon other grounds, 2 Am. Jur. 2d *Administrative Law*, §649 (1962). Therefore, this case must rise or fall upon the limited question whether the Arkansas Supreme Court, unlike the legislative and executive branches of government, will be allowed to divest Petitioners of property rights without due process and just compensation. We trust that this court will agree with us that it cannot do so.

Respectfully submitted

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APPENDICES

APPENDIX "A"

OPINION OF THE ARKANSAS SUPREME COURT AND DISSENT

SUPREME COURT OF ARKANSAS

STATE OF ARKANSAS, ET AL ..... *Appellants*

vs. No. 79-320

W. L. McILROY, ET AL ..... *Appellees*

Opinion Delivered March 17, 1980
An Appeal from the Franklin County Chancery Court
Ozark District

RICHARD MOBLEY, *Chancellor*

Reversed.

DARRELL HICKMAN, *Associate Justice*

W. L. McIlroy and his late brother's estate, owners of 230 acres in Franklin County, sought a chancery court declaration that their rights as riparian landowners on the Mulberry River were, because the stream was not a navigable river, superior to the rights of the public.

McIlroy joined as defendants the Ozark Society, a conservationist group, and two companies that rent canoes for use on the Mulberry and other Ozark Mountain streams. The State of Arkansas, intervening, claimed Mulberry was a navigable stream and the stream bed the property of the State, not the McIlroys.

The Ozark Society and the other defendants generally claimed that the Mulberry was a navigable stream but that even if the court found otherwise, a public easement in the Mulberry should be recognized. The defendants also argued that the public had acquired a prescriptive easement in the river and that the act admitting Arkansas into the Union placed the Mulberry in the public domain.

The chancellor declared the Mulberry was not a navigable stream. He found the McIlroys owned it as riparian property owners with the incidental right to prevent the public from using the stream (the McIlroys owned land on both sides of the Mulberry.) He declined to enjoin the Ozark Society from the publication of "The Mighty Mulberry," a brochure proclaiming the Mulberry as an excellent stream for canoeing.

The State, the Ozark Society and one of the canoe suppliers appealed. Their essential allegations of error are that the chancellor was wrong in his determination that the Mulberry was not navigable and in failing to find the existence of a public or prescriptive easement. The Arkansas Canoe Club and the Arkansas Farm Bureau Federation each filed an amicus curiae brief. The canoe club generally supported the appellants and also asked us to declare almost every other similar stream in Arkansas navigable. The Farm Bureau's brief supported the claims of the appellee landowners.

As we define the term "navigable" we find the Mulberry River, as it passes through McIlroy's property, to be navigable. Consequently, we reverse the chancellor's decree in that regard. Our decision precludes the necessity to discuss any of the other issues raised on appeal.

The Mulberry River, located in northwest Arkansas, heads up in the Ozark Mountains and flows in a westerly direction for about 70 miles until it joins the Arkansas River. It could best be described as an intermediate stream, smaller than the Arkansas River, the lower White and Little Red Rivers and other deep, wide rivers that have been used commercially since their discovery. But neither is it like the many small creeks and branches in Arkansas that cannot be regularly floated with canoes or flatbottomed boats for any substantial period of time during the year. The Mulberry is somewhere in between. It is a stream that for about 50 or 55 miles of its length can be floated by canoe or flatbottomed boat for at least six months of the year. Parts of it are floatable for longer periods of time. The Mulberry is a typical rock-bottomed Ozark Mountain stream, flowing with relatively clear water and populated by a variety of fish. Smallmouth bass favor such a stream and populate the Mulberry.

For most of its distance it is a series of long flat holes of water interrupted by narrower shoals. These shoals attract the canoeists. McIlroy describes the stream as following a torturous course; canoeists find it an exciting stream testing the skill of an experienced canoeist. Watergaps, affairs of wire or boards erected across the stream to hold cattle, have at times been erected but, according to W. L. McIlroy, they go down with the first rise of water. It is not a stream easily possessed. In recent years, the Mulberry has claimed the lives of several canoeists.

Annually, since 1967, the Ozark Society has sponsored for its members one or more float trips on the Mulberry River. These trips take them through McIlroy's property, which is located about 23 miles up the river from where

the Mulberry enters the Arkansas. McIlroy said he had a confrontation with Ozark Society members in 1975 when about 600 people put in at a low water bridge on his property. The bridge, near Cass, serves a county road, and is undisputably a public bridge. Canoeists and fishermen have regularly used it as an access place to the river.

Although we are aware of the general characteristics of the river, we must here only determine the navigability of the Mulberry as it flows through the appellees' property. The chancellor faced this issue and ruled the river non-navigable. We reverse his decision and hold that the Mulberry River is navigable. While our decision will be a precedent for this river and should be used by the public and landowners as such, of necessity the judgment is directed only to the parties to this lawsuit.

This is essentially a lawsuit about the river as it passes through McIlroy's property. W. L. McIlroy testified that just below the bridge is a long hole of water, perhaps the longest on that stretch of the river, which is about 100 feet wide; it narrows to a shoal. He said a man could wade the water almost any time of the year. He claimed the river could sometimes not be canoed for an entire year. He said dry spots usually existed for six to eight months of the year. He denied seeing a canoe before 1974. However, from 1947 to 1971, McIlroy was in California. During that time he would spend only a week or so a year in Arkansas.

The great preponderance of the evidence conflicts with McIlroy's estimate of the river. It is floatable for at least six months of the year. According to a pamphlet, "The Float Streams of Arkansas," published by an Arkansas state agency, the floating season is October through June. This is for a course from a point considerably upstream from

McIlroy's property to the river's mouth, a distance of about 50 miles. Numerous canoeists testified they had floated the Mulberry through the Cass area, mostly in the spring of the year. It was not disputed, however, that at times, usually in the summer months, the Mulberry could not be floated.

The evidence by testimony and exhibits demonstrates conclusively that the Mulberry had been used by the public for recreational purposes for many years. It has long been used for fishing and swimming and is today also popular among canoeists.

Seven witnesses from the locality testified. All testified they had fished or swum in the Mulberry at this locality and had never sought permission nor thought they needed it. It is only necessary to summarize some of their testimony. Thelma Smee, 51, said she was born on the McIlroy property and that people had fished up and down the Mulberry all her life. She never thought of having to get permission; nor she said would anyone expect even a total stranger to get permission to fish or swim. Curtis Childers, 66, born near the Mulberry, said four generations of Childerses, never having to get permission, have swum and fished the Mulberry. He recalled canoes on the river as early as 1967. Gary Turner, 36, grew up on the Mulberry at Turner Bend. His father, who owned a grocery store on the river, started a vehicle shuttle service for canoeists in the late 1950's or early 1960's. He had floated the Mulberry numerous times and never sought permission or felt he needed it. The Turners are still landowners on the Mulberry.

Fasie Toris lived near the Mulberry all her life, annually floating this segment of the Mulberry with her family

numerous times. She never got permission nor felt anyone needed it. She concluded, "You may own the land but you don't own the water."

Several state and federal officials testified. Richard Davies, Director of Arkansas State Parks and Tourism, said his agency, along with the Arkansas Game and Fish Commission, published, in 1978, a pamphlet, "The Float Streams of Arkansas," listing 14 of Arkansas' most popular fishing and canoeing streams. The Mulberry was touted as Arkansas' finest white water float stream and as an excellent habitat for smallmouth bass. Davies said he considered the water open to the public. George Purvis of the Arkansas Game and Fish Commission said the Mulberry was included in the phamphlet because it was one of the top five or six streams in the state for both floaters and fishermen. He also considered it open to the public. William E. Keith, an employee of the Game and Fish Commission, said fish were stocked on the Mulberry periodically from 1952 through 1977, sometimes at the low water bridge at Cass.

Nineteen canoeists testified and three others' testimony was offered by stipulation. All had floated the Mulberry, most several times; some numerous times. None had ever sought permission nor thought they needed it. No one's right to canoe was challenged until McIlroy challenged some of them in 1978. Harold Hedges began floating it in 1952, with about 20 other people. Most canoeists had floated the Mulberry in the 60's and 70's. Evidence showed the Ozark Society, a conservationist group, had sponsored floats annually from 1967 to 1978.

Besides McIlroy's testimony, several other local landowners testified or their stipulated testimony was presented. Woody Woolsey, who had lived most of his life next to the

river, said he considered the stream private. He said he first saw a canoe in 1974. George Freeman, living nearby for 50 years, said he expected people to get permission to use the stream. He considered the stream private property.

Al Wiederkehr bought land on the Mulberry in 1966 and agreed he thought the Mulberry private property. He said his land was posted. The former sheriff of Franklin County, W. D. Gober, who built a cabin on the McIlroy property, said he first saw canoes in 1974. The testimony of five others was offered to the effect that the Mulberry was private property or used only with permission.

The original government plat made of this area in 1838 was introduced and shows the "Mulberry Creek" was "meandered" by the surveyors. Meander lines are those representing the border line of a stream and such lines are considered prima facie evidence of navigability. *Lutesville Sand & Gravel Co. v. McLaughlin,* 181 Ark. 574, 26 SW2d 892 (1930).

The facts presented prove that the Mulberry River at the point in question is capable of recreational use and has been used extensively for recreational purposes. We must now decide whether such a stream is navigable.

Determining the navigability of a stream is essentially a matter of deciding if it is public or private property. See, *State v. Korrer,* 127 Minn. 60, 148 NW 617, supp op 127 Minn. 77, 148 NW 1095 (1914). Navigation in fact is the standard modern test of navigability, and, as embroidered by the federal courts, controls when navigation must be defined for federal purposes — maritime jurisdiction, regulation under the Commerce Clause, and title disputes between the state and federal governments. See, *Hitchings v. Del Rio*

Woods Recreation & Park District, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976); *Day v. Armstrong,* 362 P.2d 137 (Wy. 1961). Otherwise, the states may adopt their own definitions of navigability. *Donnelly v. United States,* 228 U.S. 243 (1913).

While navigation in fact is widely regarded as the proper test of navigability, *St. Louis, Iron Mountain & Southern Railroad Co. v. Ramsey,* 53 Ark. 314, 13 SW 931 (1890), it is a test which should not be applied too literally. For example, it has been said a stream need not be navigable at all its points or for the entire year to be navigable. *Economy Light & Power Co. v. United States,* 256 U.S. 113 (1921). The real issue in these cases is the definition of navigation in fact.

Arkansas has adopted the standard definition of navigability. *Lutesville Sand & Gravel Co. v. McLaughlin, supra.* That test, which was similar to the general test used by the federal courts, defines navigability in terms of a river's potential for commercial usefulness; that is, whether the water could be used to remove the products of the surrounding land to another place. That definition reads:

> . . . Nor is it necessary that the stream should be capable of floating boats or rafts the whole, or even the greater part of the year. Upon the other hand, it is not sufficient to impress navigable character that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this were so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or

> bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then in the American sense, it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort and advance the prosperity of the community. But it is evident that sudden freshets at uncertain times cannot be made available for such purposes. No prudent man could afford the expense of preparation for such events, or could trust to such uncertainty in getting to market. The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round. (Citing authorities). *Id.* at 576-77.

Therefore, a river is legally navigable if actually navigable and actually navigable if commercially valuable.

However, in the case of *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378 (1915), this Court foresaw, no doubt, that things would change in the future and that recreation would become an important interest of the people of Arkansas. The language in the *Barboro* case is almost prophetic. While adhering to the standard definition of navigability, with its dependence upon a commercial criterion, the Court went on to say:

> It is the policy of this state to encourage the use of its water courses for any useful or beneficial purpose. There may be other public uses than the carrying on

> of commerce of pecuniary value. The culture of rice is being developed in this state and the waters of the lake could be used for the purpose of flooding the rice fields and for other *agricultural purposes.* As the population of the state increases, the banks of the lake may become thickly populated, and the water could be used for domestic purposes. Pleasure resorts might even be built upon the banks of the lake and the water might be needed for municipal purposes. *Moreover, the waters of the lake might be used to a much greater extent — for boating, for pleasure, for bathing, fishing and hunting than they are now used.* [Emphasis added]. *Id.* at 382-383.

Since that time no case presented to us has involved the public's right to use a stream which has a recreational value, but lacks commercial adaptability in the traditional sense. Our definition of navigability is, therefore, a remnant of the steamboat era.

However, many other states have been presented with this same problem. Back in 1870, the Massachusetts Supreme Court found a stream navigable that could only be used for pleasure. The stream was about two feet deep at low water. The Court stated:

> If water is navigable for pleasure boating, it must be regarded as navigable water though no craft has ever been upon it for the purpose of trade or agriculture. *Attorney General v. Woods,* 108 Mass. 436, 440 (1870).

In Ohio, the court recently was faced with this problem and decided to change its definition of navigation. The Ohio Court said:

> We hold that the modern utilization of our water by

> our citizens requires that our courts, in this judicial interpretation of the navigability of such water, consider this recreational use as well as the more traditional criterion of commercial use. *State, ex rel v. Newport Concrete Co.,* 44 Ohio App. 2d 121, 127, 73 Ohio Ops. 2d 124 (1975).

Applying a "public trust" to the Little Miami River, the Ohio court found that the State of Ohio ". . . holds these waters in trust for those Ohioans who wish to use the stream for all legitimate uses, be they commercial, transportational, or recreational." *State, ex rel v. Newport Concrete Co., supra.*

Michigan reached a similar conclusion in 1974. Navigability in Michigan was significantly affected by whether logs had been, or could be, floated down a stream. That "floatable test" had been used by the Michigan court until it was confronted with the same problem that we have. Michigan readily admitted that its definition needed to be changed:

> We therefore hold that members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft. *Kelley, ex rel MacMullan v. Hallden,* 51 Mich. App. 176, 214 NW2d 856, 864 (1974).

For examples of other states that have adopted similar definitions of navigation, see: *People v. Mack,* 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *Lamprey v. State,* 52 Minn. 181, 53 NW 1139 (1893); *Luscher v. Reynolds,* 153 Or. 625, 56 P.2d 1158 (1936).

Arkansas, as most states in their infancy, was mostly concerned with river traffic by steamboats or barges when cases like *Lutesville,* supra, were decided. We have had no case regarding recreational use of waters such as the Mulberry. It may be that our decisions did or did not anticipate such use of streams which are suitable, as the Mulberry is, for recreational use. Such use would include flatbottomed boats for fishing and canoes for floating — or both. There is no doubt that the segment of the Mulberry River that is involved in this lawsuit can be used for a substantial portion of the year for recreational purposes. Consequently, we hold that it is navigable at that place with all the incidental rights of that determination.

McIlroy and others testified that the reason they brought the lawsuit was because their privacy was being interrupted by the people who trespassed on their property, littered the stream and generally destroyed their property. We are equally disturbed with that small percentage of the public that abuses public privileges and has no respect for the property of others. Their conduct is a shame on us all. It is not disputed that riparian landowners on a navigable stream have a right to prohibit the public from crossing their property to reach such a stream. The McIlroys' rights in this regard are not affected by our decision. While there are laws prohibiting such misconduct, every branch of Arkansas' government should be more aware of its duty to keep Arkansas, which is a beautiful state, a good place to live. No doubt the state cannot alone solve such a problem, it requires some individual effort of the people. Nonetheless, we can no more close a public waterway because some of those who use it annoy nearby property

owners, than we could close a public highway for similar reasons.

In any event, the state sought a decision that would protect its right to this stream. With that right, which we now recognize, goes a responsibility to keep it as God made it.

Reversed.

Fogleman, C.J., dissents.

SUPREME COURT OF ARKANSAS

STATE OF ARKANSAS, ET AL ..... *Appellants*

vs. No. 79-320

W. L. McILROY, ET AL ..... *Appellees*

Opinion Delivered March 17, 1980

APPEAL FROM FRANKLIN CHANCERY COURT
OZARK DISTRICT

RICHARD MOBLEY, *Chancellor*

CONCURRING IN PART
DISSENTING IN PART

JOHN A. FOGLEMAN, *Chief Justice*

I cannot join in the court's new definition of navigability, even though I concur in the reversal of the decree in this case. My disagreement is based upon the court's departure from two overriding and interrelated legal principles, i.e., the effect of a rule of property and the vesting of property rights.

Never before in Arkansas, has determining the navi-

gability of a stream been essentially a matter of deciding if the water is public or private property. Quite the reverse — the rights of riparian owners have depended upon the test of navigability. Although it may be rather loosely said that a body of water that has been meandered in a government survey of the stream is prima facie navigable, the question is determined under local law and not by the surveyors. In *Lutesville Sand & Gravel Co. v. McLaughlin*, 181 Ark. 574, 26 SW2d 892, we treated this matter by reference to *Harrison v. Fite*, 78 C.C.A. 447, 148 F. 781 (1906), saying:

> * * * This case involved the navigability of Big Lake and Little River in this State, and affirmed the decree of the circuit court of the United States for the Eastern District of Arkansas (148 Fed. 781) holding that those waters were not navigable. Much that was said in the opinion in that case is relevant here, and upon the question of meandered streams it was there said: "The action of the government surveyors in meandering a body of water or in surveying its bed is to be considered as evidence upon the question of its navigability or unnavigability at the time; but it is not conclusive. The surveyors are invested with no power to foreclose inquiry into the true character of the water. If the United States has disposed of lands bordering upon a meandered unnavigable water course or lake, by a patent containing no reservations, and there is nothing else indicating an intention to withhold title to the lands within the meander lines (*Niles v. Cedar Point Club*, 175 U.S. 300, 20 S.Ct. 124, 44 L.Ed. 171) it has nothing left to convey; and whether the title to the bed of the waters is in the State or passes to the grantee in

> the patent is determined by the local law. (*Lamprey v. Minnesota,* 52 Minn. 181, 53 NW 1139, 18 L.R.A. 680, 38 Am. St. Rep. 541). * * * Courts take judicial notice of the navigable character of our important rivers and inland lakes — those that are so within our common knowledge; but there are many of such insignificant capacity and doubtful utility that the question, being one of fact, is to be determined by the evidence produced, and in such case the burden of proof rests upon him who asserts the existence of the public servitude."

The majority, however, makes too much of the statement that the fact that surveyors meandered a stream is prima facie evidence of navigability. If so, that prima facie effect seems to vanish when contrary evidence is introduced. It is quite clear that the burden of proving navigability is upon the party asserting it, and it seems that the burden of proving the public servitude is upon the party asserting its existence, regardless of the fact that the body of water is meandered in the government survey. *Little Rock, Miss. River & Tex. R.R. Co. v. Brooks,* 39 Ark. 403, 43 Am. Rep. 277; *Lutesville Sand & Gravel Co. v. McLaughlin,* supra; *Harrison v. Fite,* supra. The effect of those decisions really is that the fact that the surveyors meandered the stream is of evidentiary value on the issue. The real significance of that fact is put in proper perspective in *McGahhey v. McCollum,* 207 Ark. 180, 179 SW2d 661, where we said that it is *merely a circumstance* tending to show navigability. It is also clear that once navigable does not mean always navigable. *Five Lakes Outing Club, Inc. v. Horseshoe Lake Protective Ass'n,* 226 Ark. 136, 288 SW2d 942; *Parker v. Moore,* 222 Ark. 811, 262 SW2d 891.

The majority treatment of *Barboro v. Boyle,* supra, as

a prophecy of a new test of navigability, is certainly not warranted, in view of the fact that this court fifteen years later, in *Lutesville,* treated that case as an application and approval of the long-standing Arkansas test of navigability. The language quoted from *Barboro* in the majority opinion is nothing more or less than a recitation of uses that might be made of the waters of Horseshoe Lake as a navigable stream. It followed a statement that it was the policy of this State to encourage the use of its water courses for any useful or beneficial purpose. This court certainly was not prophesying a new or modern test of navigability in *Barboro,* and any notion that it was is dispelled, not only by the statement in *Lutesville,* but by the opinion in *Barboro* itself, in which it was held that Horseshoe Lake was navigable within the meaning and spirit of our former decision, because it was susceptible of use for commercial navigation, even though it had never been utilized for that purpose except at irregular intervals. In 1953, this court again recognized the viability of the test of commercial potential. *Parker v. Moore,* 222 Ark. 811, 262 SW2d 891. We applied the *Barboro* test as late as 1973 in *Hayes v. State,* 254 Ark. 680, 496 SW2d 372.

We have never, in any subsequent decision, prior to today's, considered that *Barboro* did more than hold that susceptibility to use for commercial navigation, rather than a history of such use is the true test of navigability. This was recognized in *McGahhey v. McCollum,* supra. In *Barboro* itself, we merely gave effect to the holding in *Little Rock, Miss. River & Tex. R.R. Co. v. Brooks,* supra, that the test was "usefulness" of the stream to the population of its banks as a means of carrying off the products of their fields and forests or bringing to them articles of merchandise.

In 1930, long after the decision in *Barboro v. Boyle*, 119 Ark. 377, 178 SW 378, we said that the law on the subject had long been at rest in this State and pointed out that the test announced in *Little Rock, Miss. River & Tex. R.R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277, had been consistently followed. That test, as quoted in and approved in both *Lutesville Sand & Gravel Co. v. McLaughlin*, 181 Ark. 574, and *Barboro v. Boyle*, supra, was:

> * * * Nor is it any objection to the public easement for navigation; that riparian proprietors of lands, along fresh waters, own to the thread of the stream. Nor is it necessary that the stream should be capable of floating boats or rafts the whole, or even the greater part of the year. Upon the other hand, it is not sufficient to impress navigable character that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this were so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort and advance the prosperity of the community. But it is evident that sudden freshets at uncertain times cannot

be made available for such purposes. No prudent man could afford the expense of preparation for such events, or could trust to such uncertainty in getting to market. The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round. (Citing authorities).

The rights of riparian owners have always been considered as vested property rights in this State. As early as 1927, we considered that it was well settled that owners of land bordering on a nonnavigable stream, the boundary lines of which were meandered by the government survey, acquired title to the middle or thread of the stream. *Kilgo v. Cook,* 174 Ark. 432, 295 SW 355; *Goforth v. Wilson,* 208 Ark. 35, 184 SW2d 814. The ownership in fee and control of a riparian owner extend to that part of the surface of the stream that lies above that portion of the bed owned by him. *Medlock v. Galbreath,* 208 Ark. 681, 187 SW2d 545.

Where persons have acquired property rights upon the faith and credit of prior judicial decisions, those decisions and the rights acquired thereunder should not be disturbed. *Hobbs v. Lenon,* 191 Ark. 509, 87 SW2d 6. At least one owner, A. Weiderkehr, acquired property on the Mulberry thinking that the waters were private, and he was justified in doing so under our prior decisions.

A settled legal principle governing the ownership and devolution of property is a rule of property. Decisions of the highest court of a state when they relate to and settle some principle of local law directly applicable to title are rules of property. *Gibson v. Talley,* 206 Ark. 1, 174 SW2d

551. A rule of property so established should not be disturbed. *Fisher v. Cowan,* 205 Ark. 722, 170 SW2d 603.

The test of navigability is the means of determining the property rights of riparian owners. As such it is a rule of property.[1] To repudiate this rule of property by judicial decision will have the effect of invalidating titles that were acquired in reliance upon the rule and such a change, if desirable, should be brought about by legislation, which operates only prospectively and cannot upset titles already vested. See, *Eubanks v. McDonald,* 225 Ark. 470, 283 SW2d 166; *Pyron v. Blanscet,* 218 Ark. 616, 238 SW2d 636. We are not free to disregard a rule of property. *Bishop v. Williams,* 221 Ark. 617, 255 SW2d 171. Where our holdings have become a rule of property, they must not be overruled retroactively or retrospectively. *O'Brien v. Atlas Finance Co.,* 223 Ark. 176, 264 SW2d 839; *Hare v. General Contract Purchase Corp.,* 220 Ark. 601, 249 SW2d 973.

Even a legislative enactment cannot destroy vested rights which riparian owners have in a nonnavigable stream. *State v. Brace,* 76 N.D. 314, 36 NW2d 330 (1949); 65 CJS 78, Navigable Waters, §7(b). And the legislature could not by a retroactive definition of navigability transfer to the state a property right either in a body of water or the bed thereof that has been previously acquired by a private owner. *Ozark-Mahoning Co. v. State,* 76 N.D. 464, 37 NW2d 488 (1949); *State v. Brace,* supra; 67 CJS 79, Navigable Waters, §7(b). To do so without compensation is unthinkable. *Ozark-Mahoning Co. v. State,* supra; *State v. Brace,* supra; 78 Am. Jur. 2d 517, §68 and cases cited. See, 65 CJS

[1]**United States v. Wilson & Co., 214 F. 630 (E.D. Ark.) aff'd. sub nom. Wilson & Co. v. United States, 142 C.C.A. 351, 227 F. 82 (8th Cir.), aff'd. 245 U.S. 24, 385 S.Ct. 21, 62 L.Ed. 128 (1917).**

78, Navigable Waters, §7(b); *Downes v. Crosby Chemicals, Inc.*, 234 So.2d 916 (Miss. 1970). What this court said over a century ago in *Martin Ex Parte*, 13 Ark. 198, when we had no specific constitutional prohibition against the taking of private property without just compensation, is particularly appropriate here, viz:

> * * * The right of the citizen to acquire, possess and protect property, thus guaranteed to all by the fundamental law, being a limitation imposed by the people upon the government of their own creation, and designed to protect the weak against the strong, the minority against the majority, would be of little avail and but an empty sound, if the legislative department possesses the power to divest him of it without adequate compensation, through caprice, or even in the exercise of honest but misguided judgment, or, upon that most dangerous of all pretences, for State reasons, and the policy of promoting what may be deemed the public good.

The adoption of a so-called modern test changes a rule of property and apparently divests titles that have been vested under the prior test. In Arkansas, unlike communist states, it is the right of private property, not the rights of the public, that rises above constitutional sanction. Article 2, §22, Constitution of Arkansas. This is one of the fundamental distinctions between our system and the communistic form of government and its focus is directed to public rights asserted in streams. *Downes v. Crosby Chemicals, Inc.*, supra. The statement that the right of property is before and higher than any constitutional sanction is more than a slogan. It has found application in our decisions. See, *City of Fayetteville v.*

S & H, Inc., 261 Ark. 148, 547 SW2d 94; *Arkansas State Highway Com'n v. Turk's Auto Corp., Inc.*, 254 Ark. 67, 491 SW 2d 387; *Blundell v. City of West Helena*, 258 Ark. 123, 522 SW2d 661; *Poole v. State*, 244 Ark. 1222, 428 SW2d 628; *City of Little Rock v. Raines*, 241 Ark. 1071, 411 SW2d 436; *Sheet Metal Workers Int. Ass'n v. E. W. Daniels Plumbing & Heating Co.*, 223 Ark. 48, 264 SW2d 597; *Young v. Gurdon*, 169 Ark. 399, 275 SW 890. The prohibition against the taking, appropriation or damaging of private property without just compensation is binding on all branches of government. The judicial branch is no more vested with the power to take, appropriate or damage the established property rights of individuals without compensating them than is the executive branch. And yet the apparent effect of this decision accomplishes that very result. I submit that, insofar as titles vested under the test of navigability applied up until this very date, the change of the test is a violation of due process of law under both the state and federal constitution, as well as Art. 2, §§22 and 23 of the Arkansas constitution. Judicial submission to public clamor is not in keeping with constitutional government.

Less than four months ago, the Supreme Court of the United States held that the government could not give the public a right of access, or prevent the owners from denying public access, to waters which had been private property under state law, without paying just compensation to the owners, even though the character of the waters had been changed from nonnavigable to navagable. *Kaiser Aetna v. United States*, —— U.S. ——, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979). What we said in *Shellnutt v. Arkansas State Game & Fish Com'n*, 222 Ark. 25, 258, SW2d 570, applies here, viz:

> It is not necessary that the property should be completely taken in order to bring the case within the protection of this Constitutional guaranty.[6] * * *

[6]Under this Constitutional guaranty, we have held that dumping sewage into a stream and polluting the waters thereof was a damage to a lower riparian owner, and such owner was entitled to recover damages, under the quoted Constitutional provisions. See, **McLaughlin v. Hope,** 107 Ark. 442, 155 SW 910, 47 L.R.A., N.S. 137. Again, we held that the pollution of the air over private property by offensive odors escaping from a sewer tank, was a damage to adjacent residential property, within the quoted Constitutional provisions. See, **Sewer Dist. v. Fiscus,** 128 Ark. 250, 193 SW 521, L.R.A. 1917D, 682.

The matter had been put in sharp focus in *Meriweather Sand & Gravel Co. v. State,* 181 Ark. 216, 26 SW2d 57, where we said:

> * * * Riparian rights inhere in the owner of the soil and are part and parcel of the land itself, and are vested and valuable rights which no more may be destroyed or impaired than any other part of a freehold.

It is distressing to me that the concern of this court for private property rights so recently and forcibly applied in such cases as *Loyd v. Southwest Arkansas Utilities Corp.,* 264 Ark. 818, 580 SW2d 935, and *Robinson v. Arkansas State Game & Fish Com'n,* 263 Ark. 462, 565 SW2d 433, seems to have stopped at the banks of the Mulberry River (Creek?).

Acquisition by prescription, or adverse possession, cannot be based upon hunting and fishing (or presumably swimming) upon the stream. This question was put to rest in *State ex rel Thompson v. Parker,* 132 Ark. 316, 200 SW 1014, where we said:

> * * * Occasional or oft-repeated incursion upon the lands of another for the purpose of hunting and fishing does not signify any intention to appropriate the lands

> to one's own use. The act of hunting and fishing on the unenclosed lands of another is not an act of possession. It does not denote any purpose to hold the same adversely, and thereby exclude the owner from dominion over his property, and it does not have any such effect. * * *

See, also, *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378; *Medlock v. Galbreath,* 208 Ark. 681, 187 SW 545. On the other hand, any use of the water of a nonnavigable stream for boating purposes by one other than the owner is an infringement of the rights of the owner. See, *Medlock v. Galbreath,* supra.

I find that the record discloses that the public has acquired an easement to use of the Mulberry River across the lands of the appellees by prescription just as fully as they would have acquired an easement for vehicular traffic across their riparian lands by adverse use for more than seven years after appellees should have known that the public use was adverse. That such an easement may be acquired by prescription was recognized in *Buffalo River Conservation & Recreation Council v. National Park Service,* 558 F.2d 1342 (8th Cir. 1977), in reliance upon *Clinton Chamber of Commerce v. Jacobs,* 212 Ark. 776, 207 SW2d 616 (1948); *Howard v. State,* 47 Ark. 431, 2 SW 331; *Patton v. State,* 50 Ark. 53, 6 SW 227; *McClain* [*McLain*] *v. Keel,* 135 Ark. 496, 205 SW 894.

In 1967, W. R. McIlroy and his brother Grady, acquired the farm located at the low water bridge on Mulberry Creek from their father who died July 9, 1971. The farm had been owned by someone in their immediate family since 1927. A crop has been planted on it each spring. Cattle have been kept on the farm and a portion of it is in pasture. There were

three houses and there were sharecroppers who lived on the land. A man named James Jones presently lives in a house on the farm that is over 100 years old. Activity on the river can be observed from portions of the McIlroy fields.

There have been at least one, sometimes two or three, scheduled floats on the Mulberry River conducted by the Ozark Society every year beginning with the summer of 1967 and extending through the winter of 1977-1978. Harry Crisson had floated through the McIlroy property in April of each of the years 1965, 1967, 1972 and 1973. In 1965, there were 19 or 20 people on the same trip. Nancy Jack, a free-lance writer, had floated through the property five times. On the first trip, which was in 1964, 20 people were with her. On the second trip in May, 1965, 19 were with her. In 1967, there were about 26 people on the trip. Curtis Childers, who said he had been on the Mulberry a thousand times in his 66 years, testified that people commonly used the Mulberry. He recalled boating on the Mulberry from the "thirties" until the present. He first began noticing canoes on the river in 1967 and had seen them every year since then. At first there would be one or two on one day and three or four the next, but there are a "bunch more" now. He felt that it was the tradition of the area to float without permission. Donald Rice of Altus had floated through the property two or three times a year beginning in 1960 or 1961. William E. Keith, Jr., Chief of the Fisheries Division of the Arkansas Game & Fish Commission, testified that fish had been "stocked" periodically at the low water bridge from 1952 to 1977. Douglas Tims first floated through the McIlroy property in April, 1972, and had floated it about 30 times a year since then. Arthur Foy Evans, a Gravette dentist, first floated through the McIlroy property in 1967

and, except for two years that he was in military service, floated the river through the property every year thereafter. Bob McCoy had floated through the property four or five times during the past eight years. Harold Hedges of Concord kept logs of his floats. He had floated through the property on the following dates: Oct. 20 and 21, 1952; April 19, 1964; April 3 and 4, 1965; May 31, 1965; April 29 and 30, 1967; April 28 and 29, 1969. On the last date, he had lead a party of 20 or 25 people on a three-day Mulberry excursion at the request of the Forest Service. Leonard Heman had floated through the property on May 31, 1965 and in April, 1967, with 10 to 20 persons. Norman C. Preston had floated through the property in April, 1964 and May, 1965. There were 12 other people with him on the first trip and 23 on the second. Ray Fuller floated through the property in 1967 and once each spring over the next nine years. Melvin Smith floated through the property in 1964. His next trip was in April, 1965, as one of 18 people. In May of 1967, he again floated through the property in a party of eight. His next trip was in 1972. He said that in 1973 he was one of a party of 11 people who floated through the property. In 1975, he was in a float party of 30 people in 16 canoes. Dr. John Ewing first floated through the property in May, 1965 and averaged two trips a year until five years prior to trial, when he moved to Ozark and took the float trips more frequently. Fasie Torix had floated through the property 10 to 20 times per year over the past 30 years. Jesse Jones, who had lived along the river for 13 years, first saw a canoe on the river in the early 1950's. He said that canoes had been coming through since 1966, and that the canoe traffic had increased every year. Joseph Acuff had a record of 12 float trips spanning the years 1965 through 1976. On most of the trips,

the low water bridge was either the "put-in" point or the "take-out" point.

Gary Turner had floated through the property several times a year. A shuttle service for canoeists was started by his father at the father's grocery store and service station in the late 1950's or early 1960's. The operation continued until a year or two before the trial. Over the period of time, the Turners shuttled over 1000 cars.

David Thrasher, a Fayetteville engineer who is president of the Arkansas Canoe Club, first floated through the property in 1970, and has averaged two or three trips per year since then. Stewart Noland was a member of parties numbering 2 to 12 persons which had floated through the property nearly every spring beginning in 1971. He had taken two such canoe trips in the fall.

The notoriety of the use made of the stream is evidenced by the publication of "The Float Streams of Arkansas," beginning in the spring of 1978 by the Arkansas Game & Fish Commision and the Arkansas Department of Parks & Tourism, listing the Mulberry River for a distance of 55 miles from the Arkansas River as one of those streams.

The chancellor held that canoeing constituted only an occasional trespass and that the right to use the stream had been asserted or brought home to the landowner within the period of limitations. I respectfully disagree. It is true that McIlroy and others denied knowing of the use being made of the stream for as long as seven years. The absence of W. M. McIlroy from the area during the early use of the stream by canoeists will explain his professed ignorance of the facts to some extent. There is evidence from which it might be said that the use which began about 1952 was permissive.

That use steadily increased, and must have been obvious to anyone who observed the stream from the McIlroy farm. A use that originates as a permissive use may be treated as adverse and becomes an absolute right to a passageway, not only when it continues openly for seven years after the landowner has knowledge that the use is adverse to his interest, but alsc when the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse. *Weigel v. Cooper,* 245 Ark. 912, 436 SW 2d 85; *McGill v. Miller,* 172 Ark. 390, 288 SW 932; *Fullenwider v. Kitchens,* 223 Ark. 442, 266 SW2d 281, 46 ALR 2d 1175. I think that it was shown by a clear preponderance of the evidence that the owners of the McIlroy lands should be presumed to have known that a passageway on the Mulberry River was being used by the public adversely to them and under a claim of right.

Since I cannot agree to the taking and appropriating by judicial fiat of vested property rights of riparian owners on streams which are nonnavigable under the test applied in Arkansas for a century, I must dissent from the majority opinion, but I would reverse the decree on the ground that a prescriptive easement has been acquired by adverse use.

APPENDIX "B"

DECREE OF FRANKLIN COUNTY CHANCERY COURT

IN THE CHANCERY COURT OF
FRANKLIN COUNTY, ARKANSAS
OZARK DISTRICT

W. L. McILROY and JAMES DUNLAVEY as
Executor of the Estate of GRADY R. McILROY,
as Tenants in Common ..... *Plaintiffs*

vs. Case No. E-78-76

OZARK SOCIETY and WAYFARER
EXPIDITIONS, INC. ..... *Defendant*

and

THE STATE OF ARKANSAS ..... *Intervenor and Defendant*

DECLARATORY JUDGMENT AND
RESTRAINING ORDER

Now on this 16th day of May, 1979, the above cause comes on for hearing, and from a review of the pleadings, the testimony of the parties and their witnesses, the statements of counsel, and from a complete review of the file and all exhibits, the Court doth find:

I

The Plaintiff, W. L. McIlroy, is a citizen and resident of the Ozark District of Franklin County, Arkansas, and owns property as tenants in common with the estate of Grady R. McIlroy, his deceased brother. James Dunlavey is the lawful and acting executor of the estate of Grady R.

McIlroy, having been appointed by order of the Probate Court of Franklin County, Ozark District, Docket No. P-77-13. W. L. McIlroy and the estate of Grady R. McIlroy own as tenants in common the following described property, to-wit:

TRACT NO. 1: The North Half of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 80 acres; The Southeast Quarter of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 40 acres; The East Fourth of the Southwest Quarter of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 10 acres; The Northwest Quarter of the Northwest Quarter of Section 27, Township 12 North, Range 26 West, 40 acres; The Southwest Quarter of the Northwest Quarter of Section 17, Township 12 North, Range 26 West, 40 acres; Part of the Southwest Quarter of the Southwest Quarter of Section 22, Township 12 North, Range 26 West, 10 acres; Part of the Southeast Quarter of the Southeast Quarter of Section 21, Township 12 North, Range 26 West, 10 acres, containing in all 230 acres, more or less.

TRACT NO. 2: Part of the South Half of the Southwest Quarter of Section 24, AND Part of the Northwest Quarter of Section 25, in Township 12 North, Range 27 West, more particularly described as beginning at the Southwest Corner of said Section 24, running thence South 7.4 chains to a dry branch, thence with the meanderings of said branch to the South side of the Northwest Quarter of the Northwest Quarter of said Section, thence East to the Southeast Corner of said Northwest Quarter of the Northwest Quarter, thence East 15.06 chains, thence North 31½ degrees West 29.94

chains, thence North 19.43 chains, thence South 5.52 chains to the place of beginning. ALSO 2.66 acres in the Northeast Corner of the Southwest Quarter of the Northwest Quarter of said Section 25, hereby conveying 62 & 2/10 acres, more or less. Tract No. 2 conveys all that part of what was formerly known as the A. H. Sadler farm which was owned by the heirs of Miles Childers.

II

The Defendant, Ozark Society, is a non-profit corporation by virtue of its Articles of Incorporation filed with the Secretary of State of Arkansas on December 2, 1974. The Defendant, Wayfarer Expeditions, Inc., is a Missouri corporation authorized to do business in the State of Arkansas. The State of Arkansas has intervened in this cause on behalf of the general public, and specifically on behalf of the Arkansas Game and Fish Commission and the Arkansas Department of Parks and Tourism and has filed a counterclaim against the Plaintiffs. The Plaintiffs, in turn, have amended their pleadings to include the State of Arkansas as a party defendant. The Court has subject matter jurisdiction of this cause and personal jurisdiction over the Defendants, Ozark Society, Wayfarer Expeditions, Inc., and the State of Arkansas.

III

The Court makes the following findings of fact and law, to-wit:

(1) The Mulberry is not now and has not been a navigable stream as such at any relevant time in the past.

(2) The Federal Acts of Admission of Arkansas to the

Union do not contain public reservation of rights to non-navigable waters.

(3) The present state of the law as we understand it in Arkansas is the bed of a non-navigable stream is owned by adjoining owners to the center of the stream. In this case, Mr. McIlroy owned land on both sides of the stream through which the stream runs.

(4) The rights to enjoin the trespass, I am holding that Mr. McIlroy does have the right for the following reasons:

1. No public rights under the reserved title on rights in the public as described in Paragraph 2.

2. There is no prescriptive easement obtained by the canoeing which amounted to be what we would call occasional trespass. Any right to canoe or use of the stream by individuals or the public was asserted or brought home to the landowner within the period of limitations.

(5) Plaintiff's petition to enjoin the Defendant's publication of "The Mighty Mulberry" is hereby denied.

IV

The Ozark Society, Wayfarer's, Inc., and all persons having notice of this decree, their officers, agents, servants and employees, and licensees, are hereby enjoined from trespassing on that part of the Mulberry running through Mr. McIlroy's property as recited. The matter of publication of the order to be by posting, notices, posting of copies of decree, newspaper publication, radio, etc.

V

Costs are adjudged against the Defendant.

VI

The Court retains jurisdiction of the parties and the subject matter for all purposes, specifically including the enforcement of this decree.

IT IS SO ORDERED.

/s/ Richard Mobley,
Chancery Judge

APPROVED AS TO FORM:

/s/ Ronald W. Metcalf
Attorney for Plaintiff

/s/ Paul Means
Attorney for the State of Arkansas

/s/ Bay Fitzhugh
Attorney for Ozark Society

/s/ Jay Penix
Attorney for Wayfarer Expeditions, Inc.

Filed for record this 12th day of June, 1979.

Chancery Book "S", page 1.

/s/ Janice Morris,
Chancery Clerk

APPENDIX "C"

PETITIONERS' PETITION FOR REHEARING

IN THE SUPREME COURT OF ARKANSAS

STATE OF ARKANSAS, ET AL ..... *Appellants*

vs. No. 79-320

W. L. McILROY, ET AL ..... *Appellees*

PETITION AN MEMORANDUM STATEMENT
REQUESTING REHEARING

The Appellees pursuant to Rule 20 of the Supreme Court are constrained to petition this Court for rehearing and to point out some of the deleterious effects of the Court's opinion delivered March 17, 1980. Without substantial discussion or reasoning, this Court has ignored and tacitly reversed over 150 years of well-developed case law concerning navigability of streams in this State. Many of the adverse effects of this decision were pointed out in the dissenting opinion of Chief Justice John A. Fogleman. Appellees would ask the Court to consider the following ramifications as a basis for reversal.

1. Judge Fogleman's dissenting opinion as it relates to the issue of navigability is incorporated herein by reference. The decision, as the dissent points out, clearly takes property (riparian rights) without due process of law and without any compensation, contrary to the United States and Arkansas Constitutions. By judicial fiat, this Court has determined that the new test of navigability is whether a stream is susceptible to a recreational use at some time of the year. There is

presently no such thing as a non-navigable stream in this State. Any insignificant freshet is now a navigable stream. The Court has performed what the Arkansas Legislature for many sessions has refused to do, and what they continued to refuse to do when they enacted Arkansas Natural and Scenic Rivers System, Act No. 257 of 1979.

2. The decision forever forecloses any cause of action in favor of the riparian owner of any stream for pollution since under the decision the State of Arkansas is the owner, and the only remedy would, therefore, be in favor of the State. *See, e.g., McLaughlin v. City of Hope,* 107 Ark. 443 (1913).

3. The decision prevents the riparian owner from ever diverting the waters of a stream or creek, either to create a body of water by damming, or to use the waters for irrigation, since the ownership of the stream or creek is now vested in the State and not in the riparian owner. By virtue of this Court's new and liberal definition of navigability, there remains virtually no stream in Arkansas which is non-navigable. The decision therefore directly controverts Ark. Stat. Ann. Sec. 35-501, *et seq.,* allowing damming of non-navigable streams.

4. The decision divests the riparian owner of any minerals or mineral rights beneath the streambed, and prevents the sale by the riparian owner of gravel or sand from the bed of the stream, because title is now vested in the State.

5. The decision emaculates riparian owners of any control or dominion over thousands of small nonnaviga-

ble streams in this State. Picnicing, boating, swimming, fishing and other activities upon these creeks might be engaged in by any who chose to do so at any time of the day or night. Additionally, McIlroy will not be able to fence the stream during the summer to prevent his cattle from escaping.

It cannot be over-emphasized that the Supreme Court in this instance has chosen to sit not as the judicial arm of the State, but as the legislative. The legislature has steadfastly refused to create a new rule of property which would provide a public easement for recreational purposes. The Appellees' property is being commercialized and used as a State park by Appellants and the general public for their own pecuniary gain. To change the definition of navigability at this late date is a cruel hoax to the thousands of rural property owners in this State who have purchased property through U. S. Government patents to the center of the stream and paid property taxes on their property with no possible idea that the State would later appropriate their property for public use.

HARDIN, JESSON & DAWSON
P.O. Drawer 968
Fort Smith, Arkansas 72902

By: RONALD W. METCALF

Attorneys for Appellees

CERTIFICATE OF SERVICE

I, RONALD W. METCALF, do hereby certify that a copy of the enclosed Petition was mailed to Thomas A. Martin, Jr., Bay Fitzhugh, James H. Penix, Jr., P.A., Paul Means, Howard Cockrill and Jack T. Lassiter on April 1, 1980, at the addresses listed on the pleadings previously filed with this Court.

/s/ Ronald W. Metcalf

APPENDIX "D"

COPY OF DOCKET SHEET FROM OFFICE OF CLERK, ARKANSAS SUPREME COURT, REFLECTING DENIAL OF PETITION FOR REHEARING APRIL 21, 1980

79-320

Filed Sept. 13, 1979

ee certified to
preme Court
ov. 14, 1979. (CA 77-222)

andate to Clerk
4-21-80

11-7-79. Def. Appee Brief served
11-8-79. Def. Appellee Security Served
11-15-79 Def. State of Ark. Brief
11-30-79. Amicus Brf. Served (Ark. Canoe Club)
12-13-79 Brf. Appellee Served
12-14-79 Brf. Farm Bureau Served
12-28-79 Reply Brf. Served (Ozark Society)
12-28-79 Reply Brf. Served (State of Arkansas)
3-10-80 Submitted on Motion to file amicus curiae brief.
3-12-80. Reply to Response to motion to file amicus brief
3-17-80 Refused. Hickman J.
3-17-80 Motion to file amicus curiae brief denied.
4-1-80 Pet for Rehearing Served Appellee.
4-7-80 Response to rehearing Served
4-14-80 Submitted on Pet. for Rehearing.
4-21-80. Rehearing denied.

10-9-79. Appell
11-13-79 Printin
10-10-79. Appell
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10-10-79. Motion
10-26-79. Mot
Sum
11-13-79. Print
11-16-79. Motion
case
11-26-79 above
11-29-79. Mot
12-3-79. Mot
12-20-79. Appell
addit
12-19-79. Appell
dismi
12-26-79. Noted.
12-26-79 Resp
for Oral Arg
12-28-79. Mot
Curiae brief
12-31-79. Submitted
1-7-80. Response
Newton C
1-7-80. Motion for a
1-7-80. Motion of Nat
2-19-80 Submi
3-3-80 Motion
amicus brief
3-4-80. Response
brief.